

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRYAN J. VALVERDE,) Case No. C-11-2423 SC
)
Plaintiff,) ORDER GRANTING WELLS
) FARGO'S MOTIONS TO DISMISS
v.) AND STRIKE
)
WELLS FARGO BANK, N.A.; and ETS)
SERVICES, LLC, INC.,)
)
Defendants.)

I. **INTRODUCTION**

Plaintiff Bryan J. Valverde ("Plaintiff") commenced this action against Defendants Wells Fargo Bank, N.A. ("Wells Fargo") and ETS Services, LLC ("ETS")¹ (collectively, "Defendants"), bringing twelve claims relating to unsuccessful loan modification discussions between Plaintiff and Wells Fargo and Defendants' subsequent attempts to foreclose on Plaintiff's home. ECF No. 1 ("Notice of Removal") Ex. A ("Compl."). Two fully briefed motions are before the Court -- Wells Fargo moves to dismiss and to strike portions of Plaintiff's Complaint. ECF Nos. 12 ("MTS"), 13

¹ Pursuant to California Civil Code § 2924l, ETS filed a declaration of non-monetary status in which it declares that it was named as a defendant in this action solely because it is the trustee under the deed of trust executed by Plaintiff. ECF No. 11. Because no objection to ETS's declaration has been served or filed, the Court finds that ETS shall not be required to participate in the action, shall not be subject to any monetary awards, and shall be bound by any court order relating to the subject deed of trust. Cal. Civ. Code § 2924l(d).

1 ("MTD"), 17 ("MTD Opp'n"), 18 ("MTS Opp'n"), 27 ("MTD Reply"), 28
2 ("MTS Reply").² For the following reasons, the Court GRANTS Wells
3 Fargo's motions.

4

5 **II. BACKGROUND**

6 As it must on a Rule 12(b)(6) motion, the Court assumes the
7 truth of the well-pleaded facts in Plaintiff's Complaint.³
8 Plaintiff, a resident of Marin County, held title to a property
9 located at 122 Marion Avenue, Mill Valley, California, 94941-2617
10 ("the property"). Compl. ¶ 6. On or about July 14, 2007,
11 Plaintiff obtained a residential adjustable-rate home mortgage loan
12 of \$1,045,000 from World Savings Bank FSB ("World Savings"). Id. ¶
13 9. Plaintiff alleges, and Wells Fargo concedes, that World Savings
14 later changed its name to Wachovia Mortgage, FSB ("Wachovia"), and
15 is now a division of Wells Fargo. Id. ¶ 2.⁴

16 Plaintiff alleges that in offering the loan, World Savings
17 engaged in "predatory lending" because it knew "that housing prices
18 were inflated above real value" and it "intended to sell-off many

19
20 ² Plaintiff's MTD Opposition exceeds Civil Local Rule 7-4(b)'s page
21 limit by several pages. After filing it, Plaintiff filed a motion
22 seeking leave to exceed this page limit, claiming that "Plaintiff's
23 attorney momentarily failed to consider the page limitation
requirement" and ensuring the Court that such error "will not occur
again." ECF No. 22. The Court GRANTS Plaintiff's Motion, and puts
the parties on notice that it will not condone future violations of
court rules.

24 ³ However, the Court does not accept as true allegations that
25 contradict exhibits attached to the Complaint or matters properly
subject to judicial notice. Manzarek v. St. Paul Fire & Marine
Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

26
27 ⁴ Wells Fargo seeks judicial notice of various documents in support
of these contentions. ECF No. 14 ("RJN"). The Court judicially
28 notices the above facts, as well as the fact that Wachovia
converted to Wells Fargo Bank Southwest, N.A., which then merged
with and into Wells Fargo Bank, N.A.

1 loans that had been made to borrowers with sub-standard credit" as
2 part of a fraudulent scheme. Id. ¶ 10. Plaintiff alleges that due
3 to the subsequent rapid reduction in home values, he was unable to
4 sell or refinance his home, and if World Savings had notified him
5 that housing prices were inflated and that a housing collapse was
6 imminent, he never would have agreed to the loan. Id.

7 Plaintiff claims representatives of Wachovia told him that he
8 must be sufficiently in default for three months in order to
9 qualify for in-house modification of his loan. Id. ¶ 26.

10 Plaintiff ultimately defaulted on his loan. Id. Plaintiff claims
11 that when Wells Fargo took over Wachovia, it canceled this in-house
12 modification program. Id. Plaintiff alleges that he worked toward
13 loan modification with Defendants⁵ for more than a year "while at
14 the same time Wells Fargo Bank was continuing with their
15 foreclosure on their dual track approach to loan modification,
16 always holding out the carrot of a modification at the same time
17 having the hammer over the homeowner with a foreclosure on his
18 property." Id. Plaintiff was told he did not qualify for the
19 government's HAMP loan modification program because it only went up
20 to \$750,000. Id. He claims Defendants failed to process his loan
21 modification application and instead continued to tell him that he
22 needed to produce documentation that he had already produced. Id.
23 He alleges that Defendants never intended to modify his loan, but
24 led Plaintiff to believe otherwise. Id.

25 Plaintiff brings twelve causes of action. First, he brings a
26 declaratory action challenging Defendants' standing to initiate
27 foreclosure proceedings on the property. Id. ¶¶ 16-23. Second, he

28 ⁵ Plaintiff's Complaint attributes numerous actions to "Defendants" without identifying the specific parties by name.

1 seeks an injunction restraining Defendants from selling the
2 property. Id. ¶ 24. Third and fourth, he claims intentional
3 infliction of emotional distress ("IIED") and negligent infliction
4 of emotional distress ("NIED") caused by Defendants' activity
5 during the attempted mortgage modification and foreclosure. Id. ¶¶
6 25-32. Fifth, he brings an action to quiet title to the property,
7 alleging that Defendants have failed to establish a clear and
8 unbroken chain of title for both the deed of trust and the
9 promissory note. Id. ¶¶ 33-39. Sixth, he brings a claim for
10 breach of the implied covenant of good faith and fair dealing
11 ("good faith claim"), alleging that Defendants failed to evaluate
12 Plaintiff's financial condition for foreclosure avoidance; advise
13 Plaintiff of his statutory right to meet with Wells Fargo regarding
14 such foreclosure avoidance; and advise Plaintiff of the toll-free
15 HUD phone number regarding counseling opportunities to avoid the
16 subject foreclosure. Id. ¶¶ 40-44. Seventh, Plaintiff brings a
17 claim of deceit, alleging that on or about October 1, 2009,
18 Defendants falsely told Plaintiff that Plaintiff would be placed in
19 a loan modification program if he stopped making payments and went
20 into default, and that until the loan review process was completed,
21 the house would not be sold at a trustee's sale. Id. ¶¶ 45-55.
22 Eighth, Plaintiff brings a claim for "fraud and deceit -- negligent
23 misrepresentation." Id. ¶¶ 56-58. Ninth, Plaintiff brings a claim
24 for promissory estoppel. Id. ¶¶ 59-64. Tenth, Plaintiff brings a
25 claim for negligence, alleging Defendants owed Plaintiff a duty to
26 disclose information "regarding the loan and to act in accordance
27 with banking industry practice, statute, and regulations, and to
28 act with respect to Plaintiff in good faith and with fair dealing."

1 Id. ¶¶ 65-68. Eleventh, Plaintiff brings a claim under section
2 1798.82 of California's Civil Code, alleging "Defendants failed to
3 timely disclose to Plaintiff the disclosure of his personal
4 information." Id. ¶¶ 69-71. Twelfth, Plaintiff brings a claim
5 under section 17200 of California's Business and Professions Code
6 ("section 17200"), alleging that Defendants implemented and
7 perpetrated a "fraudulent scheme of inducing Plaintiff to accept
8 mortgages based on inflated property valuations." Id. ¶¶ 71-98.

9 Defendants removed this action from state court. See Notice
10 of Removal. On June 30, 2011, Plaintiff filed an ex parte motion
11 for a temporary restraining order, seeking to restrain Defendants
12 from selling the property at a trustee's sale scheduled to occur on
13 July 22, 2011. ECF No. 30. A hearing occurred on July 7, 2011;
14 the Court denied Plaintiff's motion and permitted the trustee's
15 sale to go forward as scheduled. ECF No. 34.

16 Wells Fargo moves to dismiss Plaintiff's Complaint. Wells
17 Fargo argues that Plaintiff's claims are preempted by the Home
18 Owners' Loan Act ("HOLA"); that Plaintiff lacks standing and is
19 judicially estopped from asserting claims due to his failure to
20 disclose them in bankruptcy; and that all of Plaintiff's claims
21 fail to satisfy the relevant pleading requirements. See MTD.
22 Wells Fargo also moves to strike portions of Plaintiff's Complaint
23 in which fraud is alleged on the basis that Plaintiff has failed to
24 plead facts sufficient to support them. See MTS.

25
26 **III. LEGAL STANDARD**

27 A motion to dismiss under Federal Rule of Civil Procedure
28 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.

1 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
2 on the lack of a cognizable legal theory or the absence of
3 sufficient facts alleged under a cognizable legal theory.
4 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
5 1990). "When there are well-pleaded factual allegations, a court
6 should assume their veracity and then determine whether they
7 plausibly give rise to an entitlement to relief." Ashcroft v.
8 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
9 court must accept as true all of the allegations contained in a
10 complaint is inapplicable to legal conclusions. Threadbare
11 recitals of the elements of a cause of action, supported by mere
12 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950
13 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
14

15 **IV. DISCUSSION**

16 The allegations made in a complaint must be "sufficiently
17 detailed to give fair notice to the opposing party of the nature of
18 the claim so that the party may effectively defend against it."
19 Starr v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011). As this Order
20 explains, Plaintiff's Complaint fails to do this. Wells Fargo
21 raises a number of compelling arguments in favor of prejudicial
22 dismissal in its motions, but due to the vagueness of Plaintiff's
23 Complaint, the Court cannot rule on these arguments with finality.
24 Accordingly, and for the reasons below, the Court DISMISSES
25 Plaintiff's Complaint. Plaintiff is granted LEAVE TO AMEND his
26 Complaint to address the deficiencies identified below.

27 **A. HOLA Preemption**

28 Wells Fargo argues that all of Plaintiff's claims are

1 preempted by HOLA because they are "based on the origination of
2 Plaintiff's mortgage loan and on Wells Fargo's subsequent servicing
3 of the loan." MTD at 5.

4 Congress enacted HOLA "to charter savings associations under
5 federal law, at a time when record numbers of homes were in default
6 and a staggering number of state-chartered savings associations
7 were insolvent." Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001,
8 1004 (9th Cir. 2008). HOLA gives the Office of Thrift Supervision
9 ("OTS") "broad authority to issue regulations governing thrifts."
10 Id. at 1005 (citing 12 U.S.C. § 1464).

11 OTS, in turn, has promulgated regulations stating that OTS
12 "occupies the entire field of lending regulation for federal
13 savings associations." 12 C.F.R. § 560.2(a) ("section 560.2").
14 Section 560.2 offers a framework for determining whether a state
15 law claim is preempted by HOLA and its implementing regulations,
16 and the Ninth Circuit has held that this framework controls.
17 Silvas, 514 F.3d at 1005. Courts must first determine whether the
18 state law is one of the enumerated types of laws expressly
19 identified as preempted in section 560.2(b). Id. These include:

20 (4) The terms of credit, including amortization
21 of loans and the deferral and capitalization of
interest and adjustments to the interest rate,
balance, payments due, or term to maturity of
the loan, including the circumstances under
which a loan may be called due and payable upon
the passage of time or a specified event
external to the loan;

24

25 (9) Disclosure and advertising, including laws
26 requiring specific statements, information, or
other content to be included in credit
application forms, credit solicitations,
billing statements, credit contracts, or other
27 credit-related documents and laws requiring
28

1 creditors to supply copies of credit reports to
2 borrowers or applicants;

3 (10) Processing, origination, servicing, sale
4 or purchase of, or investment or participation
in, mortgages;

5 12 C.F.R. § 560.2(b).

6 If the state law is one of these enumerated types, "the
7 analysis will end there; the law is preempted." Silvas, 514 F.3d
8 at 1005. If not, the court should determine "whether the law
9 affects lending." Id. If it does, the law is presumed to be
10 preempted, subject to the exceptions provided by section 560.2(c).

11 Id. Section 560.2(c) provides:

12 State laws of the following types are not
13 preempted to the extent that they only
14 incidentally affect the lending operations of
Federal savings associations or are otherwise
consistent with the purposes of [section
15 560.2(a)]:

16 (1) Contract and commercial law;

17 (2) Real property law;

18 (3) Homestead laws specified in 12 U.S.C. §
1462a(f);

19 (4) Tort law;

20 (5) Criminal law; and

21 (6) Any other law that OTS, upon review, finds:

22 (i) Furthers a vital state interest; and

23 (ii) Either has only an incidental effect
24 on lending operations or is not otherwise
contrary to the purposes expressed in
paragraph (a) of this section.

25
26 12 C.F.R. § 560.2(c). These exceptions are "to be interpreted
narrowly." Silvas, 514 F.3d at 1005.

27
28 Wells Fargo argues that Plaintiff's claims are preempted under

1 section 560.2(b)(4), (b)(9), and (b)(10). MTD at 4. Wells Fargo
2 argues that Plaintiff's chief allegations of wrongdoing -- that
3 Defendants committed fraud, acted in bad faith, or otherwise
4 violated the law during the loan modification discussions and the
5 foreclosure procedure -- concern "processing" or "servicing" of the
6 mortgage and thus compel preemption. Id.

7 Plaintiff argues that HOLA should not apply because only
8 federal savings banks and associations are regulated by OTS and
9 covered under HOLA, and while World Savings and Wachovia were
10 federal savings banks, Wells Fargo is not. MTD Opp'n at 2-3.
11 Wells Fargo counters that HOLA should apply because "in a merger
12 the surviving entity succeeds to the rights of the prior entity."
13 MTD Reply at 1. Wells Fargo cites several court orders from within
14 this district in which HOLA was found to apply "even though the
15 conduct at issue occurred after Wells Fargo merged with Wachovia."
16 Haggarty v. Wells Fargo Bank, N.A., 2011 WL 445183 at *4 (N.D. Cal.
17 Feb. 2, 2011); DeLeon v. Wells Fargo Bank, N.A., 729 F. Supp. 2d
18 1119, 1126 (N.D. Cal. 2010).

19 The Court finds that HOLA applies to this action, including
20 Wells Fargo's servicing of the loan. However, HOLA preemption is
21 not as broad as Wells Fargo argues it is. In Silvas, the Ninth
22 Circuit focused not on the nature of the cause of action allegedly
23 preempted, but rather on the "functional effect upon lending
24 operations of maintaining the cause of action." Naulty v.
25 GreenPoint Mortg. Funding, Inc., No. 09-1542, 2009 WL 2870620, at
26 *4 (N.D. Cal. Sep. 3, 2009). "The question was rather whether an
27 application of a given state law to the activities of federal
28 savings associations would 'impose requirements' regarding the

1 various activities broadly regulated by the OTS." Id. Courts have
2 thus interpreted Silvas to not preempt all state law causes of
3 action arising out of loan modification and/or foreclosure
4 proceedings, but only those that impose new requirements on the
5 lender. E.g., Susilo v. Wells Fargo Bank, N.A., No. 11-1814, 2011
6 WL 2471167, at *4-6 (C.D. Cal. June 21, 2011) (denying bank's
7 motion to dismiss borrower's breach of contract, negligence, bad
8 faith, and fraud claims as preempted by HOLA).

9 To the extent that Plaintiff's claims are premised on fraud or
10 promises made by Wells Fargo, such claims are not necessarily
11 preempted. For instance, Plaintiff alleges that Defendants
12 encouraged him to pursue loan modification when Defendants had no
13 intention of agreeing to modification; such a claim is not
14 preempted. As the Court will discuss, this allegation fails to
15 state a viable claim. However, it also does not impose a new
16 requirement on Wells Fargo -- the only "requirement" it imposes on
17 Wells Fargo is that it be held responsible for the statements it
18 makes to its borrowers. If these causes of action were preempted,
19 federal savings associations would be free to lie to their
20 customers with impunity. On the other hand, Plaintiff's
21 allegations that Wells Fargo failed to use proper care or comply
22 with industry standards essentially seek to impose new requirements
23 on the lender, and are thus preempted by HOLA.

24 In light of this analysis, several of Plaintiff's claims are
25 extremely susceptible to HOLA preemption -- namely, Plaintiff's
26 negligence, negligent misrepresentation, NIED, and good faith
27 claims. And given HOLA's wide preemptive effect, Plaintiff has
28 failed to plead sufficient facts to render any of his claims

1 plausible. Accordingly, the Court DISMISSES all twelve of
2 Plaintiff's claims, WITH LEAVE TO AMEND. Because Plaintiff's
3 claims suffer from several additional flaws, the Court continues
4 its analysis below.

5 **B. Judicial Estoppel**

6 Wells Fargo alleges that Plaintiff filed for Chapter Seven
7 bankruptcy in June 2010, and as a consequence, any cause of action
8 Plaintiff possessed at that time is now property of the bankrupt
9 estate and can no longer be brought by Plaintiff. MTD at 8. While
10 Plaintiff's Complaint makes no mention of bankruptcy, Plaintiff
11 admits that he declared bankruptcy. MTD Opp'n at 6-7. He argues
12 that his causes of action had not yet accrued during the bankruptcy
13 proceedings, as he was still in negotiation with Wells Fargo at
14 that time. Id.

15 Wells Fargo is correct that the property of the bankruptcy
16 estate includes the bankrupt entity's causes of action. Sierra
17 Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707 (9th
18 Cir. 1986). Plaintiff's Complaint makes numerous allusions to
19 wrongdoing on the part of World Savings in the initiation of his
20 loan; because any claim arising from the 2007 loan origination
21 would have accrued by the 2010 bankruptcy proceedings, Plaintiff
22 lacks standing to bring any such claims. Plaintiff's Complaint is
23 too vague as to Wells Fargo's alleged misrepresentations and
24 promises for the Court to determine whether Plaintiff's claims
25 plausibly accrued after the bankruptcy proceedings had concluded.
26 Accordingly, Plaintiff's claims related to loan modification are
27 DISMISSED WITH LEAVE TO AMEND for failure to plead with the
28 required specificity.

1 C. Claims Challenging the Foreclosure Sale

2 Wells Fargo argues that Plaintiff's first, second, fifth, and
3 twelfth claims challenging the foreclosure sale fail because
4 Plaintiff has not tendered his indebtedness to Wells Fargo. MTD at
5 11. Wells Fargo also argues that it need not be in possession of
6 the original promissory note to initiate foreclosure proceedings,
7 and so Plaintiff's declaratory relief and quiet title claims fail
8 as a matter of law. Id. at 12.

9 Plaintiff admits that a tender of indebtedness is required to
10 set aside a foreclosure, but argues that tender is not required to
11 preemptively challenge a party's standing to foreclose on a
12 property; Plaintiff cites no law for this novel proposition. MTD
13 Opp'n at 12. Plaintiff also does not respond to Wells Fargo's
14 challenges to his "failure to produce the note" theory. Id.

15 The Court agrees with Wells Fargo, and DISMISSES Plaintiff's
16 first, second, fifth, and twelfth claims.⁶ Because Plaintiff may
17 cure these claims by tendering his indebtedness to Wells Fargo, the
18 Court does so WITH LEAVE TO AMEND.

19 D. NIED and IIED Claims

20 An NIED claim has the same elements as a claim for negligence.
21 Lawson v. Mgmt. Activities, 69 Cal. App 4th 626, 656 (1999).
22 Accordingly, a plaintiff asserting an NIED claim must show that the
23 defendant owed the plaintiff a duty of care. Id. To plead a claim
24 for IIED, Plaintiff must allege: "(1) extreme and outrageous
25 conduct by the defendant with the intention of causing, or reckless
26 disregard of the probability of causing, emotional distress; (2)

27
28 ⁶ Furthermore, as the foreclosure sale was scheduled to occur in July 2011, the Court assumes it has already occurred, and so any challenge to Wells Fargo's standing is likely moot.

1 the plaintiff's suffering severe or extreme emotional distress; and
2 (3) actual and proximate causation of the emotional distress by the
3 defendant's outrageous conduct." Christensen v. Super. Ct., 54
4 Cal. 3d 868, 903 (1991). Conduct is only "extreme and outrageous"
5 when it was "so extreme as to exceed all bounds of that usually
6 tolerated in a civilized community." Davidson v. City of
7 Westminster, 32 Cal.3d 197, 185 (1982) (citation omitted). For
8 emotional distress to be severe, it must be "of such substantial
9 quantity or enduring quality that no reasonable man in a civilized
10 society should be expected to endure it." Fletcher v. Western
11 Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397, (Ct. App. 1970).

12 Wells Fargo argues that Plaintiff's NIED and IIED claims fail
13 as a matter of law. MTD at 14. Wells Fargo argues that to state
14 an NIED claim, Plaintiff must allege Defendants breached a duty of
15 care owed to Plaintiff, and argues that because a financial
16 institution "owes no duty of care to a borrower when the
17 institution's involvement in the loan transaction does not exceed
18 the scope of its conventional role as a mere lender of money,"
19 Plaintiff's NIED claim fails. Id. at 14-15 (citing Nymark v. Heart
20 Fed. Savings & Loan, 231 Cal. App. 3d 1089, 1096 (Ct. App. 1991)).
21 Plaintiff responds that "the bank exceeded its conventional role as
22 money lender" by offering "comprehensive restructuring and loan
23 modification services." MTD Opp'n at 14.

24 The Court agrees with Wells Fargo that Plaintiff's NIED and
25 IIED claims are insufficiently pleaded. In rather broad strokes
26 and with little detail, Plaintiff alleges that he suffered extreme
27 emotional distress due to Defendants' conduct. He fails to state
28 what about Defendants' conduct rendered it so extreme as to "exceed

1 all bounds of that usually tolerated in a civilized community." He
2 fails to state what duty Wells Fargo owed him, and how that duty
3 was breached. He fails to allege proper damages. However, the
4 Court rejects Wells Fargo's arguments that these claims are barred
5 as a matter of law.

6 **E. Fraud and Negligent Misrepresentation Claims**

7 Wells Fargo challenges Plaintiff's seventh and eighth claims,
8 as well as other portions of Plaintiff's complaint which allege
9 fraud. MTD at 17. Claims sounding in fraud are subject to a
10 higher pleading standard. Fed. R. Civ. P. 9(b). "To satisfy Rule
11 9(b), a pleading must identify the who, what, when, where, and how
12 of the misconduct charged, as well as what is false or misleading
13 about [the purportedly fraudulent] statement, and why it is false."
14 Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d
15 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted).
16 Plaintiff's Complaint obliquely refers to numerous unidentified
17 "statements" by unidentified representatives of Defendants; he
18 fails to sufficiently identify "what" these statements were, "when"
19 they were made, or "who" said them. Far more detail is required
20 than what Plaintiff supplies here. Accordingly, Plaintiff's
21 seventh and eighth fraud claims are DISMISSED WITH LEAVE TO AMEND
22 and Wells Fargo's MTS is GRANTED.

23 **F. Good Faith Claim**

24 In California, "[e]very contract imposes upon each party a
25 duty of good faith and fair dealing in its performance and its
26 enforcement." Carma Dev. (Cal.), Inc. v. Marathon Dev. California,
27 Inc., 2 Cal. 4th 342, 371 (1992). "In general, the covenant
28 imposes a duty upon a party to a contract not to deprive the other

1 party of the benefits of the contract." Sutherland v. Barclays
2 American/Mort. Corp., 53 Cal. App. 4th 299, 314 (Ct. App. 1997).

3 Wells Fargo alleges that Plaintiff's good faith claim "is in
4 actuality a claim that Wells Fargo breached Civil Code § 2923.5."
5 MTD at 20. Wells Fargo argues that section 2923.5 is preempted by
6 HOLA. Id. Wells Fargo also argues that "one of the elements of a
7 breach of the covenant claim is that the plaintiff did all, or
8 substantially all, of the significant things the contract
9 required," and because Plaintiff admits that he defaulted on the
10 loan, his claim fails. Id.

11 California's Civil Code provides a framework for non-judicial
12 foreclosure: the lender must first record a notice of default; once
13 three months have elapsed, the lender must give notice of the
14 planned foreclosure sale. Cal. Civ. Code § 2924. Within this
15 framework, section 2923.5 concerns the notice of default. It
16 requires the "mortgagee, trustee, beneficiary, or authorized agent"
17 seeking to file a notice of default to first contact the borrower
18 in person or by telephone "in order to assess the borrower's
19 financial situation and explore options for the borrower to avoid
20 foreclosure." Cal. Civ. Code § 2923.5(a)(2). The notice of
21 default may not be filed until thirty days after this initial
22 contact or the statute's due diligence requirements are satisfied.
23 Id. § 2923.5(a)(1). During this initial contact, the party seeking
24 to file a notice of default must advise the borrower that he or she
25 has the right to request a subsequent meeting and, if requested,
26 schedule the meeting within fourteen days. Id. § 2923.5(a)(2).

27 The California Court of Appeal has narrowly interpreted
28 section 2923.5 "as to avoid having the state law invalidated by

1 federal preemption." Mabry v. Super. Ct., 185 Cal. App. 4th 208,
2 231 (Ct. App. 2010). The rights provided to borrowers under
3 section 2923.5 are purely procedural -- there is no "right" to a
4 loan modification. Id. The lender's obligations under section
5 2923.5 to "assess" the borrower's financial situation and "explore"
6 options to avoid foreclosure can be satisfied by simply asking the
7 borrower "why can't you make your payments?" and "telling the
8 borrower the traditional ways that foreclosure can be avoided
9 (e.g., deeds 'in lieu,' workouts, or short sales)." Id. at 232.
10 The statute does not place a duty on the lender "to become a loan
11 counselor itself." Id. at 219. The only remedy section 2923.5
12 offers is the postponement of a foreclosure sale until the lender
13 comes into compliance with the statute. Mabry, 185 Cal. App. 4th
14 at 213.

15 To the extent Plaintiff's bad faith claim is merely a claim of
16 violation of section 2923.5, this claim is likely moot given the
17 scheduled July 2011 foreclosure sale of the house, as the only
18 remedy available under section 2923.5 -- postponement of the
19 foreclosure sale -- would be no longer available. To the extent
20 Plaintiff attempts to premise a separate good faith claim for
21 damages on Wells Fargo's alleged failure to satisfy section 2923.5,
22 such a claim is preempted under Mabry's analysis.

23 Because Plaintiff has failed to identify the contract at issue
24 and the benefits deprived by Defendants, he has failed to plead
25 this claim with the required specificity. However, the Court
26 rejects Wells Fargo's argument that Plaintiff's failure to make
27 payments under the note relieved Defendants of their duty to act in
28 good faith in performing under the note and in enforcing it. As

1 such, Plaintiff may be able to plead a claim based on Defendants'
2 conduct as a party to the deed of trust. Because Plaintiff has not
3 pleaded sufficient facts, the Court DISMISSES, WITH LEAVE TO AMEND,
4 Plaintiff's claim.

5 **G. Promissory Estoppel Claim**

6 The elements of a claim for promissory estoppel are: "(1) a
7 promise clear and unambiguous in its terms; (2) reliance by the
8 party to whom the promise is made; (3)[the] reliance must be both
9 reasonable and foreseeable; and (4) the party asserting the
10 estoppel must be injured by his reliance." Aceves v. U.S. Bank,
11 N.A., 192 Cal. App. 4th 218, 225 (Ct. App. 2011).

12 Wells Fargo argues that Plaintiff's Complaint does not allege
13 a clear and unambiguous promise upon which Plaintiff reasonably
14 relied to his detriment. MTD at 21. Wells Fargo alleges that
15 Plaintiff's assertion that Wells Fargo told Plaintiff to stop
16 making mortgage payments in order to qualify for a loan
17 modification is "implausible on its face." Id. It also alleges
18 that Plaintiff's claim that his decision to default on the mortgage
19 ruined his credit is implausible.

20 While the Court agrees with Wells Fargo that Plaintiff has
21 failed to identify a "clear and unambiguous promise," it does not
22 agree that Plaintiff's allegations are implausible on their face.⁷
23 Plaintiff's Complaint alleges that representatives of Wachovia told
24 him that he must be sufficiently in default for three months in
25 order to qualify for in-house modification of his loan. Compl. ¶

26
27 ⁷ Wells Fargo seeks judicial notice of several filings in
28 Plaintiff's bankruptcy proceeding in support of the factual
argument that Plaintiff's indebtedness to Wells Fargo was dwarfed
by his indebtedness to other creditors. The Court DECLINES this
request.

1 26. He does not allege that these representatives promised him
2 that he would qualify for the loan if he was sufficiently in
3 default; he merely alleges that he would not qualify for in-house
4 modification if he were not considerably in default. This pleading
5 is not sufficient to support a promissory estoppel claim.
6 Plaintiff must include considerably more detail in order to render
7 this claim plausible. Furthermore, Plaintiff must establish that
8 his cause of action is not duplicative of a claim for breach of
9 contract, as "tort recovery for breach of the covenant is available
10 only in limited circumstances, generally involving a special
11 relationship between the contracting parties." Bionghi v. Met.
12 Water Dist., 70 Cal. App. 4th 1358, 1370 (Ct. App. 1999).
13 Plaintiff alleges no special relationship here.

14 **H. California Civil Code § 1798.82 Claim**

15 In extremely brief language, Plaintiff claims Wells Fargo
16 violated California Civil Code § 1798.82 by failing "to timely
17 disclose to Plaintiff the disclosure of his personal information."
18 Compl. ¶ 70. Wells Fargo calls this claim "as vague as can be."
19 MTD at 23. The Court agrees. Nowhere in Plaintiff's twenty-five-
20 page Complaint is there even a fleeting reference to facts that
21 could support this claim. No "personal information" is discussed,
22 much less improper disclosure of it. The Court therefore DISMISSES
23 this claim.

24 **I. Section 17200 Claim**

25 Wells Fargo argues that Plaintiff's section 17200 claim --
26 which is premised on Plaintiff's first eleven claims -- is not
27 pleaded with the requisite particularity. MTD at 23-24. In
28 particular, Wells Fargo contends that Plaintiff "lumps all

1 defendants together without identifying which defendant committed
2 which alleged violation," and the claim "is defective to the same
3 extent that its underlying claims are defective." Id. The Court
4 agrees. The Complaint fails to state a single viable claim, and as
5 such, the derivative section 17200 claim fails as well.

6 In sum, Plaintiff's Complaint falls far short of federal
7 pleading standards. While Plaintiff is granted leave to amend his
8 complaint to address the above shortcomings, he is put on notice
9 that any claims dismissed on a subsequent motion to dismiss will be
10 dismissed WITHOUT LEAVE TO AMEND. The Court will only grant
11 additional leave to amend if Plaintiff files a motion under Rule
12 15(a)(2) of the Federal Rules of Civil Procedure establishing that
13 justice requires it.

14 Furthermore, the Court puts Plaintiff and his attorney on
15 notice that under 28 U.S.C. § 1927, "[a]ny attorney . . . who so
16 multiplies the proceedings in any case unreasonably and vexatiously
17 may be required by the court to satisfy personally the excess
18 costs, expenses, and attorneys' fees reasonably incurred because of
19 such conduct." The Court may impose such sanctions *sua sponte*.

20 Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d
21 1112, 1118 (9th Cir. 2000). If Plaintiff makes any frivolous
22 arguments in his amended complaint or pleads any clearly meritless
23 claims, he and his counsel may be subject to sanctions under 28
24 U.S.C. § 1927, Federal Rule of Civil Procedure 11, the Court's
25 local rules, and the Court's inherent power.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS the motion to
3 dismiss and the motion to strike filed by Defendant Wells Fargo
4 Bank, N.A. Plaintiff Bryan J. Valverde's Complaint is DISMISSED,
5 WITH LEAVE TO AMEND. Plaintiff is granted thirty (30) days' leave
6 to file an amended complaint. If Plaintiff fails to file an
7 amended complaint within this time frame, this action will be
8 dismissed WITH PREJUDICE.

9
10 IT IS SO ORDERED.

11
12 Dated: August 25, 2011

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15 UNITED STATES DISTRICT JUDGE